IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.236 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

JUPITER CONSTN. CO.

Appearance:

1. INCOME TAX REFERENCE No. 236 of 1991
MR MANISH R BHATT for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 02/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This is a reference under Section 256(2) of the Income Tax Act, 1961 (the Act) made by the Income Tax Appellate Tribunal Ahmedabad Bench 'A' at the behest of the Commissioner of Income Tax, Gujarat-III, Ahmedabad. The following question of law has been referred for the opinion of this Court :-

"Whether on the facts and in the circumstances of the case, the assessee is entitled to registration?"

2. The respondent assessee is a registered firm and the relevant accounting year is the year ended on 31-03-1983. It appears from the facts recorded by the Tribunal that the assessee firm was brought into existence on 02-06-1980 wherein apart from three individuals viz. Shri Hasmukhlal Chinubhai, Shri Bipinchandra Mafatlal and Shri Natwarlal Trikamlal the other three partners were trustees of private trusts viz. Shri Upendra Chinubhai, Trustee of Hetal Trust, Smt. Smruti Hasmukhbhai, Trustee of Bijal Trust and Smt. Shantaben Chinubhai, Trustee of Shalin Trust. The said firm was granted registration under Section 185 of the Act by order dated 18-02-1984 when the said partnership firm was assessed for assessment year 1981-1982.

3. During the accounting period under reference there was a change in the constitution of the firm and Shri Upendrabhai Chinubhai, Smt.Smruti Hasmukhlal and Smt.Shantaben Chinubhai, who were representing their respective Trusts in the capacity as the Trustees, retired from the firm. The said three individuals, however, joined the newly constituted firm w.e.f. 01-04-1981 in their capacities as Managers of their respective Association of Persons (AOPs). The said three individuals who were also members of their respective AOPs had joined as partners in light of the resolution passed by the respective AOPs. Registration under Section 185 of the Act was sought for by preferring application in Form No.11 which was duly signed by all the partners and accompanied by a copy of the partnership deed as required by the relevant provisions of the Act and the Rules. The Assessing Officer, however, was of the opinion that registration could not be granted to the partnership firm as the firm was not a genuine firm because the aforesaid three individuals, representing their respective AOPs, were not the real partners. That some of the members of the said AOPs were minors. That the AOPs had been constituted with the sole object of reducing the tax labilities. He, accordingly, refused

registration.

4. The said order came to be challenged by way of appeal before the Appellate Assistant Commissioner of Income Tax, AR-III, Ahmedabad, who for the reasons stated in the order dated 12-06-1985, allowed the appeal and directed the Assessing Officer to allow the registration to the assessee firm.

5. Revenue challenged the order of the first appellate authority by way of appeal before the Tribunal and the said appeal came to be registered as I.T.A. No.1827/Ahd/1985. The Tribunal held that the assessee firm had complied with the statutory requirements prescribed for seeking registration, and the Assessing Officer had not found any fault with the said application. That the ground regarding minor being a member of the AOPs was not valid in light of the decision of the Apex Court in the case of M.M. Ipoh & Ors. Vs. Commissioner of Income-Tax, Madras, [1968] 67 ITR 106. Similarly, it was not open to the Assessing Officer to take into consideration the arrangement between a partner of the firm and a stranger to the firms. That such partners' liability qua such third parties as against the other partners of the firm was different in light of the ratio in the decision of Hon'ble Supreme Court in the case of Commissioner of Income-Tax, Madras Vs. Bagyalakshmi & Co. [1965] 55 ITR 660. The Tribunal further held that merely because the AOPs were constituted for the purpose of joining the partnership firm as represented by their respective managers and resulted in reduction of liability it was not permissible to refuse registration on the said count provided the document was a genuine document and complied with the requirements of statute in light of C.I.T. Vs. Sivakasi Match Exporting Co., [1964] 53 ITR 204. The Tribunal, therefore, upheld the order of the first appellate authority.

6. Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the applicant - revenue, has been heard. Though served, there is no appearance on behalf of the respondent - assessee. Mr.Bhatt has very fairly pointed out that the controversy is no longer res integra in light of the decision of the Hon'ble Supreme Court in the case of Rashik Lal & Co. Vs. Commissioner of Income-Tax, [1998] 229 ITR 458 wherein the Court has laid down as under :-

" The application for registration of a firm has to be made under section 184 of the

Income-tax Act. It is specifically provided that:

(1) the partnership must be evidenced by an instrument in writing;

(2) the individual shares of partners must be specified in that instrument;

(3) the application for registration shall be signed by all the partners.

The very facts that individual shares of the partners have to be specified and that such partners must personally sign the partnership deed and also the application for registration, go to show that even if a person joins a firm as a representative of a Hindu undivided family or any other body or association, within the firm his position is that of an individual. He may have an agreement with a third party to divide the profits received from the firm, but that agreement does not bind the firm nor does it alter the position of the partners under the Partnership Act or the Income-tax Act. This aspect of the matter was explained by Subha Rao J. (as his Lordship, then was), in the case of CIT V. Bagyalakshmi and Co. [1965] 55 ITR 660 (SC) in the following words (page 664) :

"A partnership is a creature of contract. Under Hindu law a joint family is one of status and right to partition is one of its incidents. The income-tax law gives the Income-tax Officer a power to assess the income of a person in the manner provided by the Act. Except where there is a specific provision of the Income-tax Act which derogates from any other statutory law or personal law, the provision will have to be considered in the light of the relevant branches of law. A contract of partnership has no concern with the obligation of the partner to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua

> the partnership, he functions in his personal capacity; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties.""

7. In light of the aforesaid settled legal position and the facts found by the Tribunal there being no infirmity in the order of the Tribunal the question referred to the Court is answered in the affirmative i.e. in favour of the assessee and against the revenue.

8. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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